113-133

Office Supreme Court U. S.
FILED
DEC 2 1884
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 119.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY,
PLAINTIFF IN ERROR,

vs.

F. G. HALL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DUNCOMBE AND GALUSHA PARSONS,
of Counsel for Plaintiff in Error.

PARSONS & PERRY,
Attorneys.
DES MOINES, IOWA.

STATE CENTRAL PRINTING CO., P. O. SQUARE, DES MOINES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY,
Plaintiff in Error,

vs.

F. G. HALL,
Defendant in Error.

No. 119.

In Error to the Circuit Court of the United States for the District of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

This action was brought upon certain school district bonds issued by the board of directors of the plaintiff in error for the construction of a school-house, payable to *Foster Brothers* or *order*.

In executing the bonds lithographic blanks were used of the identical impression used in *Stone vs. School District of Steamboat Rock*, 106 U. S., 183. The bonds in that case were filled out payable to *bearer*.

Chapter 98. Laws of Iowa, 1868.

IN RELATION TO INDEPENDENT SCHOOL-DISTRICTS AND SCHOOL ORDERS.

AN ACT to Authorize Independent School-Districts to borrow Money and issue Bonds therefor, for the Purpose of erecting and completing School-Houses, Legalizing Bonds heretofore issued, and Making School Orders draw Six per cent. Interest in certain Cases.

Section 1. *Be it enacted by the General Assembly of the State of Iowa*, That independent school-districts shall have the power and authority to borrow money for the purpose of erecting and completing school-houses, by issuing negotiable bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not to exceed ten per centum per annum, which interest may be paid semi-annually, which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall have been made: *Provided*, No district shall permit a greater outstanding indebtedness than an amount equal to five per centum of the last assessed value of the property of the district.

Sec. 2. When any independent district has procured the site for and is ready to erect, or has erected and is desirous of completing its school-house, it shall be lawful for the school board of such district to submit to the voters of their district, at the annual or a special meeting, the question of issuing bonds as contemplated by this act, giving the same notice of such meeting as is now required by law to be given for the election of officers of such districts, and the amount proposed to be raised by the sale of such bonds, which question shall be voted upon by the electors; and if a majority of all the votes cast on that question be in favor of such loan, then said school board shall issue bonds to the amount voted, in denominations of not less than twenty-five dollars, nor exceeding one thousand dollars due not more than ten years after date, and payable at the pleasure of the district at any time before due, which said bonds shall be given in the name of the independent district issuing them, and shall be signed by the president of the board and delivered to the treasurer, taking his receipt therefor, who shall negotiate said bonds at not less than their par value, and countersign the same when negotiated. The treasurer shall stand charged upon his official bond with all bonds that may be delivered to him: *Provided*, That any bond or bonds not negotiated may be returned by him to the board.

Sec. 3. Nothing in this act shall be deemed to conflict or interfere with subdivision five, of section seven, of chapter one hundred and seventy-two, of the laws of the Ninth General Assembly of the State of Iowa; but in the event the electors of an independent school-district

which has issued bonds shall at the annual meeting in March, for any year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such *pro rata* portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the school board of such district to vote a sufficient per cent. on the taxable property of the district to pay such interest, and such *pro rata* portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes.

SEC. 4. All school orders shall draw six per cent interest after having been presented to the treasurer of the district, and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer.

SEC. 5. All bonds of independent districts, heretofore issued in a manner conforming substantially with the provisions of this act, are hereby declared to be legal and valid.

SEC. 6. This act being deemed by the General Assembly of immediate importance, shall be in force from and after its publication in the *Daily State Register* and *Evening Statesman*, newspapers published at Des Moines, Iowa.

Approved April 6, 1868.

The petition contains no allegation as to the citizenship of Foster Brothers. Judgment was taken by default (Id., p. 1), which defendant moved to set aside upon two grounds: first, *that the court had no jurisdiction of the cause of action;* and, second, excusing its default. The court denied the motion as to the second ground, and sustained it as to the first. Trans., p. 6.

The cause was tried without a jury, and judgment rendered in favor of the plaintiff for $7,632.84 (Id., p. 13), to reverse which this writ of error is brought. No bill of exceptions was made.

ASSIGNMENT OF ERRORS.

First. The court had no jurisdiction of the cause of action.

Second. The bonds sued upon were not authorized by the statute under which they purport to have been issued, and were not binding upon the school district.

Third. The act was in violation of section 29, article 3, of the constitution of Iowa: "*Every act shall embrace but one subject and matters properly connected therewith.*" Section four has no relation to the remainder of the act.

Fourth. The *finding*, in these words, "*finds for the plaintiff*," is insufficient to support the judgment. The court should have found the *amount*, and also upon defendant's defence of counterclaim. Trans., pp. 8 and 13.

POINTS OF LAW.

1. The petition does not set out a cause of action within the jurisdiction of the Circuit Court under the act of Congress March 3, 1875.

Desty's Fed. Pro., Sec. 629, Art. 660; *Steamboat Rock vs. Stone*, 106 U. S., 183; Code of Iowa, Secs. 20, 2804, printed p. 11; *Gregg vs. Weston*, 7 Biss., 360; *Wilson vs. Ralph*, 3 Iowa, 450; *Coe vs. R. R. Co.*, 19 Blatchf., 522; *People vs. Mead*, 42 N. Y., 124; *Draper vs. Springport*, 104 U. S. 503; *McPherson vs. Foster Bros.*, 43 Iowa, 48; *Mosher vs. Dist. of Ackley*, 44 Id., 122.

II. The petition does not show that defendant was liable upon the bonds set out.

First. Is a bill of exceptions necessary?

Suidam vs. Williamson, 20 How., 427; *Rogers vs. Burlington*, 3 Wall., 661; *Insurance Co. vs. Boon*, 95 U. S., 124; *Coughlin vs. Dist. of Columbia*, 110 Id., 11.

When an error is patent upon the record, neither a motion nor exceptiun is necessary.

Bennett vs. Butterworth, 11 How., 676.

Second. Are the instruments sued upon in accordance with the requirements of the statute? Want of power:

Marsh vs. Fulton Co., 10 Wall., 683; *Northern Bank of Toledo vs. Porter Township*, 110 U. S., 608; *Scepis vs. Wright*, 101 U. S., 665; *Anthony vs County of Jasper*, Id. 696.

Third. Bonds without recitals are not commercial paper.

Hopper vs. Covington, 10 Biss., 488.

III. District warrants are foreign to the subject of the act. Trans., p. 3.

IV. Is a finding which states no amount sufficient to support a judgment?

Should the court have found upon defendant's claim, fourth division of its answer? Tr., pp. 8 and 13; Desty, Sec. 649.

FIRST.

Of these questions we propose to consider that of jurisdiction first.

The instruments sued upon, and by exhibit made a part of the petition, are in this form:

[COPY. EXHIBIT "A."]

No. 1. $500.00.

Independent School District, Ackley, Hardin County, Iowa.

The Independent School District of Ackley, Hardin county Iowa, promises to pay to Foster Brothers, or order, at the Hardin County Bank, at Eldora, Iowa, on the 1st day of May, 1872, five hundred dollars for value received, with interest at the rate of ten per cent per annum, said interest payable semi-annually, on the 1st day of May and November in each year thereafter, at the Hardin County Bank, at Eldora, on the presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of school directors by authority of an election of the voters of said school district, held on the 23d day of

August, 1869, in conformity with the provisions of chapter 98, acts 12 General Assembly of the State of Iowa.

In testimony whereof the said Independent School District, by the board of directors thereof, have caused the same to be signed by the president and secretary, this 1st day of Nov., 1869.

(Signed.) W. H ROBERTS,
President of the Board of Directors.
S. S. LOCKWOOD,
Secretary of the Board of Directors.

Countersigned:
F. EGGERT,
Treasurer School District.

[COUPON.]

Treasurer of Independent School District, Ackley, Hardin Co., Iowa, will pay the holder hereof, on the first day of Nov., 1874, at the Hardin Co. Bank, at Eldora, Ia., twenty-five dollars, for interest due on school-house bond No. 8.

(Signed.) W. H. ROBERTS, *President.*
S. S. LOCKWOOD, *Secretary.*

Trans., p. 3.

We suppose this question to depend upon whether these instruments are within the meaning of the act of Congress of March 3, 1875, relating to the jurisdiction of the Circuit Courts, *promissory notes negotiable by the law merchant.*

First, are they negotiable instruments?

In answering this question it seems to us that two things ought to be borne in mind; first, that school districts have such powers and such only as are given by statute. Second, the distinction which this court had always prior to the act above referred to recognized as affecting the jurisdiction of the Circuit Courts between paper payable to *bearer* and that payable to *order.*

As I understand it, no paper of any kind or description which does not, when held by a *bona fide* holder for value, exclude all defenses based upon equities between the original parties, maker and taker, is negotiable by the law merchant. That

whether it passes by delivery, or whether a subsequent holder may or not under the practice of a particular State, or any practice, maintain an action upon it in his own name has nothing to do with this question

If the test is as assumed, the debate in this case, *under the decisions of this court* is reduced to the single question, whether a municipal bond which contains no recitals which can operate as an estoppel upon the maker is in the hands of a subsequent *bona fide* holder, open to an inquiry as to the defences or equities to which it was subject in the hands of the original taker?

What the *ancient* law merchant was as to what instruments were negotiable is of but little consequence and can cast but little light upon this question. I suppose it may be assumed that it was rather favorable to us than to the other side. Municipal bonds, in a large degree, certainly, owe their negotiability to the decisions of this court, and if they furnish a boundary line as to *what it is* that makes one instrument of this kind negotiable, and another not negotiable, the object of the inquiry in this case is, or ought to be, to find out where that line is, or if it has not been definitely located as to a particular case, to ascertain where it should be located according to the principles which this court has announced. We think this is easy of ascertainment, the principle is estoppel, the ground of the estoppel the recitals in the bond. If this is so the *precise* question upon which this case must be decided was decided in the case of the School District of Steamboat Rock, above cited. To argue to the contrary is to argue that an instrument may be negotiable *by the law merchant*, for the purposes of jurisdiction, which the court would be required to hold after it had taken jurisdiction, and when the trial came on was *not* negotiable. In other words, a subject, the reason for giving the federal courts jurisdiction of which was that it was one of general law, one to be determined by the general commercial law of the country or of the commercial world, would

then become one of local law, and governed not by the decisions of this court, but by those of the State courts. This construction would defeat what I assume, may be assumed as a matter of notorious publicity, the purpose which congress had in view in giving the federal courts jurisdiction of the class of paper named in the act, that the rights of the parties, the maker usually being in one state, and the holder *the purchaser contemplated when the paper was made*, a citizen of another, their rights should be governed by the general law of the country, and that the rights of the *purchaser* of *that kind of paper* should not be held subject to to the possible fluctuations of the State courts, upon that subject. This court has held this to be so as to instruments *in a certain form*, and its reason for so holding, as I understand its decisions, was that to allow the maker to contradict, to take back what it had stated in the instrument which it had given out to the public, what it had in effect *said* to the purchaser when he advanced his money upon it, would be a fraud upon him, and therefore, upon familiar principles, the maker should be estopped from denying what it had put into its bond, *from denying its recitals.*

If this is not the test, what the cases have said from *Knox County vs. Aspinwall* to the last of them is not exactly surplusage, but something worse than surplusage, for it is misleading. To decide a case by a rule, the *reason* of which fails, is not to follow the rule, but to extend it. This court has pronounced with unmistakable emphasis against extending the rule, which I assume to be now settled, which it has applied to municipal bonds, in the hands of *bona fide* holders for value. If a long series of decisions can prescribe the limits to the rule which they recognize or establish, the rule of this court is, that the negotiability of this class of instruments depends upon *whether there is anything stated upon the face of the instrument which it would be a fraud upon the purchaser to permit the maker to deny.* The rule in its detailed expression goes further. The *power* existing the

sattement must be of a fact or facts which show that it has been lawfully exercised, either that the tribunal appointed by the law has determined, *adjudicated*, the fact or by referring to the law itself and reciting that it has been complied with, and, by the case of Steamboat Rock, where *several* steps are necessary to such compliance that each has been taken. In that case (page 185), this court said: "We are of the opinion that the recitals in the bonds do not necessarily nor distinctly import any determination of that question, by the district officers, invested with authority under certain circumstances to issue them." This case, as to that question, is *only* another forty.

If it be answered—*non constat* but that these bonds were within the constitutional limit, the answer is that the right of a *Federal* court to try that question depends upon whether they were or were not *such* instruments as are described in the act defining its jurisdiction, and not whether in this particular case the officers did or did not exceed their power. That would be to make the jurisdiction of the court to try the case at all depend upon *how it decided it*, not upon some preliminary matter, or matter in abatement, but upon the merits; in other words the court would have to try the case *to find out* whether it had jurisdiction of it. To apply the rule to this particular case, the court would have jurisdiction to render *any* judgment only by finding against the defendant upon the matters set up in its answer. (Trans., p. 7.) It would have jurisdiction to render judgment for the plaintiff, but it would have no jurisdiction to render judgment against it. If no paper is negotiable by the law merchant unless it is *a courier without luggage*, and if jurisdiction means the power to decide both sides of a case, unless the case cited is conclusive of this, the jurisdiction of the federal courts as betweenthe maker and an assignee of bonds in this form, containing *this kind of a recital*, depends not upon whether the cause of

action is one of those mentioned in the act of Congress, *but upon what the defence is.*

The second question under this head, assuming for the purposes of this branch of the argument, that it may be held that these are negotiable *instruments* by the law merchant, is, are they *promissory notes*, as those words are, or were understood, by that law?

That any merchant, that any business man would think of calling an instrument in this form a promissory note very probably would not be claimed by any one, and it would probably be conceded that if they are to be *held* such it is because those words of the law merchant have a technical meaning broader, or different, from that which is given them by popular usage. At just what period in the growth of the law merchant bonds of any kind came to be looked upon as, or to be classed among negotiable instruments, it would perhaps be of no service to inquire. It is certain that that period is comparatively recent, and perhaps it would be of but little and probably of no service at all to inquire upon what *grounds* they came to be so considered. It certainly was *not* because it had ever occurred to anybody, court or lawyer, to call them *promissory notes.*

We suppose it may be safely assumed, this court has often so decided, that the mere creation by statute of a corporation for public purposes does not imply the power to issue negotiable paper of any kind, and especially a corporation whose powers are so limited as those of a school district. We suppose, too, that the power to issue one kind of an instrument does not imply the power to issue those of another kind, although the purpose designed to be served is the same, and that the question of power, as this court held in *Marsh vs. Fulton County* and in many cases since, is always one of which the purchaser must take notice at his peril. Of course, the only point of this line of

argument is, that the courts will not by construction help out one who has neglected to take care of himself by looking to the source and extent of the power which the law gave to the party issuing the instrument which he was about to purchase. The state law, the act in question, above printed, speaks of *bonds*, the act of Congress of *promissory notes*. It might be conceded that names mean nothing when the *thing* is the same, but presumptively, at least, when the things are different, when by universal usage, popular or technical, one name means one thing and the other means something else, the name used in an act of Congress or of a State legislature is of some consequence. The legislature when it has spoken of one by name will not be held to have meant or to have included the other. In this case there is no general power to borrow money. The grant is specific *to borrow money* BY *issuing negotiable* BONDS. The question to be submitted to the voters was that of issuing *bonds*. The form ~~furnished~~ *prescribed* was one appropriate to bonds, and not to promissory notes. Popular usage in such cases was to issue bonds, not promissory notes.

So far as I have been able to ascertain this question is before this court for the first time. I suppose that whether a particular instrument issued by a municipal corporation under the authority of a State statute is to be held a bond or a promissory note will depend upon how it is considered by the courts of that state.

In *Gregg vs. Weston*, 7 Biss., 360, the court held, first, that whether the note in question was or was not subject to equities in the hands of a subsequent holder, depended upon the statutes of Indiana; and, second, whether it came within the act of Congress ~~used~~ *now* here or not depended upon whether it was subject to equities. If these instruments were under seal, although they might by the modern authorities be negotiable, certainly no lawyer would think of speaking of them as promissory notes. In Iowa, by

statute, the use of seals is no longer necessary. Code, section 41, paragraph 20, reads:

> The word "deed" is applied to an instrument conveying lands, but does not imply a sealed instrument; and the words "bond" and "indenture" do not necessarily imply a seal, and the word "undertaking" means a promise or security in any form.

But I do not suppose it to follow that a conveyance of real property is no longer a deed, with all of the incidents of such an instrument when required to be under seal, or that an instrument in the *form* of a bond, as such instruments had previously been drawn, would be other, or different in legal effect, than it would have been if executed under seal the day before the law took effect. Bonds are now as frequently mentioned in the statutes of Iowa as they ever were, and not unfrequently in the same act, almost the same sentence, with notes and bills of exchange. For instance, section 2082 of the Code of 1873 says:

> NOTES in writing, made and signed by any person promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants.

And section 2084 says BONDS are *assignable* by endorsement and the assignee may maintain an action in his own name *subject to any defense which the maker may have against the assignee;* and section 2092 provides that grace shall be allowed upon negotiable *bills* or *notes* according to the principles of the law merchant; and by an act of the Sixteenth General Assembly the rule is extended to sight drafts and orders, but it is nowhere provided, nor has it ever been held in Iowa, that bonds shall be entitled to grace. They are payable according to their terms, or if the date of payment falls on Sunday, upon the next day instead of three days after or the day before, and this is a statute provision.

In Iowa it is held that the *endorsement* of a non negotiable note is a direct and not a condtional promise.

Wilson vs. Ralph, 3 Iowa, 450.

The pleader, who drew this petition, understood the distinction between bonds and notes, and designated the instruments sued upon ~~not~~ as so many bonds, as eight promissory notes. It would involve a reconstruction of the records of the Iowa courts, and the language of the legal profession of that state, to describe instruments in this form, issued by school districts or other municipal corporations in that state as promissory notes, and it would require a very considerable revision of the *judicial law* of the state to subject them to the rules, and to extend to their transfer the incidents, to give to their holders the rights and to impose upon them the obligations of the holders of *promissory notes negotiable by the law merchant*. If there is any difference in any of these respects either under the statutes of Iowa or by what remains of the common law, it would seem to follow that one of them is not the other, and by a cardinal rule of construction that a statute which includes one of them by name, excludes the other. *Coe vs. R. R. Co.*, 19 Blatchf., 322, is the only case which I have been able to find in which the effect of the change in this statute has been discussed. In that case Mr. Justice Blatchford said:

It cannot be supposed that Congress in 1875, *with the large experience which had been at that time in the United States in bonds, obligations, certificates of indebtedness*, and promissory notes, under seal and not under seal, of municipal corporations and private corporations, did not understand and recognize, in making such exception, the distinction between a promissory note negotiable by the law merchant, as an instrument well known to the law and to commerce, and to be identified by that description, *and other instruments* which, though they had become by statute or general usage or judicial decisions to be regarded as in a certain sense negotiable, *were not promissory notes negotiable by the*

law merchant. The obligations of municipalities payable to bearer have been placed by numerous decisions of the Supreme Court of the United States in the category of negotiable instruments transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them, but they do not thereby necessarily become negotiable instruments in the sense of the law merchant.

It is true that the particular instrument then before the court was in fact sealed, but if as affecting the question of negotiability, the ancient rule which distinguished between a sealed and an unsealed instrument was a *mere technical dogma*, and but little better than an *evasion*, it ought not to be of any great consequence upon this question of jurisdiction. If there is a real difference between the two that ought to control. If there is no difference at all beyond the mere form of the instruments and the parties by whom they are customarily issued, then that Congress has seen proper to include one and not the other, ought to be a sufficient reason against bringing the latter in by construction.

But an instrument in the usual and ancient form of a bond, as such instruments have been *stereotyped* from time immemorial is a bond whether under seal or not, certainly unless issued by a corporation which by its charter can contract only by contract under seal.

In *People vs. Mead*, 24 N. Y., 124, the act authorized towns to borrow money upon BONDS--identical with the act now here--the proper officers issued instruments in the form of bonds, *but not under seal.* It was urged that wanting a seal they were not *bonds*, within the meaning of the law, but the court held the contrary. What is said in that case as to the directions contained in the act is equally applicable to this case. But whatever may be the rule elsewhere, certainly in a State where it is declared by statute that the *word* does not import a seal, and under a statute

which gives authority to issue bonds, and nothing else, with specific directions as to how the bonds which it authorizes shall be executed, if the instrument, when completed, is not a *bond*, it is a nullity for the want of authority to issue it. It was upon this ground, as I understand it, that this court held in *Draper vs. Springport*, 104 U. S., 503, that an unsealed instrument was a bond within the meaning of the statute then before the courts authorizing the issuing of bonds.

This statue was before the Supreme Court of Iowa in

McPherson vs. Foster Bros., 43 Iowa, 48.

Mosher vs. Ind. Dis. of Ackley, 44 Id., 122.

In the first of them there was an extended review of the authorities.

And see

Clark vs. The City of Des Moines, 19 Id., 199.
Chamberlain vs. The City of Burlington, Id., 395.

SECOND.

The petition does not state a cause of action. First, as we understand the rule of this court it is that no bill of exceptions is necessary as to any matter which necessarily makes a part of the record without a bill of exceptions; that wherever an error is apparent on this record it is open to revision in this court, whether it be made to appear by a bill of exceptions, or in any other manner.

Suydam vs. Williamson, 20 How., 427.
Rogers vs. Burlington, 3 Wall., 661.

Second, that it is incumbent upon one suing upon this kind of paper to show that the defendant had the power under *some*

circumstances to issue the kind of paper upon which he has brought his action. That the holder is bound to look to the action of the officers, and ascertain whether the law had been so far followed by them as to justify the issuing of the bonds.

Marsh vs. Fulton Co., 10 Wall., 683.

And, third (*Lincoln vs. Iron Company*, 103 U. S., 415), that a verdict cures a defective *statement* of a title or cause of action, but does not cure the statement of a defective *title* or cause of action.

As to paper without recitals, as we suppose this in effect to be, under the decision in *Stone vs. Steamboat Rock*, this court in *Buchanan vs. Litchfield* said: "The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued without any recitals of the circumstance bringing them within the limit fixed by the constitution, was, in itself, conclusive proof in favor of a *bona fide* holder that the circumstances existed which authorized them to be issued. *We cannot so hold.*"

In *Hopper vs. Town of Covington*, 12 Reporter, 643, Gresham, Judge, in sustaining a demurrer to the petition citing this case said: "This case clearly supports the doctrine that municipal bonds which contain no recitals are not unimpeachable in the hands of *bona fide* holders for value, that is to say *they are not commercial paper.* * * * * *

Power to issue commercial paper was the exception and not the rule, and in the absence of such recitals as would preclude the municipality from impeaching the bonds in the hands of a *bona fide* holder the plaintiff has no right of action, unless he shows in his complaint that the bonds were issued in substantial compliance with the legislative enactments and for a proper purpose. Bonds which are not issued in pursuance of express legis-

lative authority, and in the mode prescribed by it, possess none of the qualities of commercial paper."

To apply these rules to the bonds now here—

First. The act provides that independent school districts shall have the power *to borrow money* for building school-houses *by* issuing negotiable bonds, which shall be delivered to the school district treasurer, who shall *negotiate said bonds* at not less than their face value, the treasurer to stand charged upon his official bond for all bonds delivered to him. Secs. 1–2.

Second. The bonds so issued may run not to exceed ten years, but *the board shall issue bonds payable at the pleasure of the district at any time before due.*

These bonds are neither in form or substance as the act requires. The petition alleges that they were issued under this act, and that they were *delivered* to *Foster Brothers.*

First. They should have been *negotiable* payable to *bearer* to enable the purchaser to carry out the purpose of their issue, to make sale of them in the market.

That was substance, for unless so issued and delivered the tax payers of the district lost the security which the law required its officers to take of the treasurer before they should deliver them to him. The district was authorized to *borrow money* for a specifie purpose only, and in a particular way only. In *Scipio vs. Wright,* 101 U. S., this court sad:

> That statute prescribed the manner in which the power it conferred should be exercised. The town was at liberty to subscribe for stock, but if bonds were used to pay for it the mode of use was directed to be borrowing money with them and paying the money to the railroad company. It is quite conceivable that the purpose of such a direction, instead of allowing an exchange of the bonds for the stock taken, was that the railroad company might obtain an amount of money equal to the amount of bonds. This was important to the company, to the town

as a stockholder, and to the public as interested in the projected railway. If the bonds might be delivered directly to the company in payment of the stock, it might sell them at a discount. Thus it would fail to obtain the assistance in building its road which the legislature contemplated it should have.

Nor is our claim inconsistent with *Rogers vs. Burlington*, for here it appears upon *the face of the bonds* that they were issued to a particular payee, which, of course, would prevent their negotiation as required by the statute, and few persons need be told, especially in a new country, that there is a great difference between cash and credit, between a school district having the money to pay its contractors and issuing to them its bonds. Its bonds might sell in New York for their face, while a builder in Iowa would be very unwilling to take them unless at a discount. The form in which these bonds were issued in that respect defeated the very purpose of the statute. That being a matter of law was a thing, as this court has often said, a *bona fide* purchaser, or any other, was bound to take notice. In *Anthony vs. The County of Jasper*, 101 U. S., 696–7, where the statute required that the bonds should be countersigned by the state auditor, this court said:

> There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability.
>
> * * * * * * * *
>
> In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law.

In the case of Steamboat Rock the bonds were payable to *bearer*, and, of course, this question could not have arisen. The holder was not an *assignee*.

Second. These bonds are not made *payable* as required by the statute. They bear a high rate of interest. It might well be

that the taxpayers of the district would have *been* willing to pay that rate of interest for two or three years, and quite unwilling to charge their property with its payment for ten years. That is not a very technical construction, but if it were, we have the authority of this court for saying that when the consequences of a different construction might be to estop the maker from proving just the facts set up by this defendant in its answer (Trans., p. 7), such ought to be the rule:

> It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the constitution and of the statute, of the provisions of which all must take notice.

If this is the rule as to recitals, clearly there ought to be no question as to the more important and fundamental question of the correspondence between the obligation of the instrument and the grant of power.

THIRD.

The act under which the bonds were issued was unconstitutional.

The constitution of Iowa provides as follows:

> SECTION 29. Every act shall embrace one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

This act embraces two subjects which have no relation to each other, certainly not such a relation that one of them is a *part* of the other, or an incident to the other, whether school orders (section 4), which may be issued for many purposes,

should bear interest or not, certainly is wholly foreign to borrowing money to build school houses. Nor is this section even limited to *independent* school districts, to which alone the other provisions of the act apply.

If the test is the *ultimate end*, that end in this case was the erection of school houses by *independent* school districts, not the payment of the current expenses, or the indebtedness, of ordinary school districts. In Iowa there are two *kinds* of school districts, namely, *District Townships* and *Independent School Districts*. They are both corporations, the first organized by the statutes, with their powers strictly defined and their territorial limits, dependent only upon the action of the board of supervisors in the organization of civil townships.

Code, sections 1713 to 1716.

Independent school districts on the contrary owe their organization to the *choice* of the voters residing within their limits, and must be a *city, town or village*.

CODE, section 1800—

Any city, town or village containing not less than two hundred inhabitants within its limits, may be constituted a separate school district and territory contiguous to such city, town or village may be included with it as a part of said separate district in the manner herinafter providad. The village herein mentioned shall be understood to be a collection of inhabitants residing within the limits of a town plat and not organized into a city or incorporated town.

The former have never been authorized to borrow money or to issue bonds for the erection of school houses.

The Supreme Court of Iowa has never passed upon the constitutionality of this act. The case of *McPherson vs. Foster Brothers* (43 Iowa, 48) was a suit by the tax-payers of the district to enjoin the collection of a tax levied under it upon the allegation that it was in excess of the constitutional limit of indebtedness.

The court held, as we suppose, first, that the limitation applied to the *indebtedness*, and not to its *form*, and that as independent districts could contract debts up to the constitutional limit, which they were authorized to do long before the passage of this act, within that amount the collection of the tax would not be enjoined. Second, that in excess of that amount the bonds were void, and third, that—

> The holders of the instrument in question cannot claim to be innocent purchasers without notice. They are purchasers of the obligations of a municipal corporation and were bound to know that the city possessed only express and limited powers. It had not, as the purchaser was bound to know, general power to enter into contract, and borrow money. The purchaser was required, for that reason, to look into the power of this city and examine the acts of its officers by whom the bonds were issued, in order to ascertain whether the law authorized the instruments and conferred authority upon the corporation in its officers to issue them. The like rule is applicable to instruments of all kinds issued by those exercising special and limited powers. It is the settled doctrine of this court. * * * * *
>
> In our opinion the fact that the bonds in question are held by innocent purchasers does not render them valid against the city.

This we suppose to be strongly in our favor upon the merits of the case, and not at all against us upon the question which we now raise as to the constitutionality of the act, as the question was not made, nor at all involved in the suit. The case of Mosher against this defendant (44 Id., 124), the subject matter of which was a part of this same issue of bonds, was a suit in equity under a subsequent act of the legislature, giving the holders of bonds issued by independent districts for the erection of school houses a lien upon the property. Of course the case does not decide the question of the constitutionality of *this* act, but the court held the later act to be unconstitutional. As far as it goes, we suppose the case upon its merits to be greatly in our favor. Among other things, the court said—

The petition alleges that the aggregate amount of the bonds in question exceeds five per centum on the value af the taxable property of the Independent School District of Ackley.

This being conceded, the bonds and coupons attached are void without regard to the good faith with which they were purchased, and the want of notice of their invalidity by the h lders.

The case that comes nearest to this in principle of any decided by the Supreme Court of the State, I think, is *Williamson vs. The City of Keokuk*, (44 Iowa, 88.) The title of the act in that case was, *An act to amend the charter of the city of Keokuk.* The *ninth* section of the act the court held unconstitutional be cause it was neither embraced in the title of the act nor germane to what was embraced in it. It was in these words:—

SEC. 9. And whereas, at elections regularly held at various times, it was determined by the legal voters of said City of Keokuk, that the city council should subscribe certain sums in the stock of the Keokuk, Fort Des Moines and Minnesota Rail Road Company, and in the Mississippi and Wabash Rail Road Company, and in the Keokuk, Mount Pleasant and Muscatine Rail Road Company; and whereas, in some instances, the bonds of the city have been issued to pay for the subscription to said stock, and in others they have not been issued, and whereas, doubts exist as to the authority of the council to issue said bonds, and to provide by taxation for the payment of the principal and interest of said bonds. Now therefore be it enacted, That the votes of the people of said city, as aforesaid, and the acts of the said city council in accordance therewith, are hereby *legalized and made firm, valid and effectual* to all intents and purposes, and that the city council of said city, is hereby authorized, empowered and directed to levy and collect such taxes as may be necessary to pay the principal and interest of said bonds, which have been so issued, or of any which may hereafter issue in accordance with any of said votes—and that so much of any act as requires an annual vote to provide for levying the tax to pay the interest on any bonds of said city is hereby repealed. The taxes aforesaid shall be levied and collected in the same manner that the other annual taxes of the city are levied and collected.

The Court said :—

"But the ninth section is in no sense an amendment of the charter. It is an attempt to legalize and make valid certain acts of the city council, and certain elections held by the people. This is neither embraced in the title of the act, nor is it germane to anything contained therein. We are, therefore, clearly of the opinion that said ninth section is void." The subject of the fourth section of the act now here it is true is embraced in the title of the act, but if it so far remote from the *other* subject embraced in the title, that if it had not been embraced in it would have been held void as too remote, *as not germane* to that subject, for the same reason it is too remote to be coupled with it in the title. If *properly connected therewith*, it *need* not be expressed in the title, as the Supreme Court of Iowa has often held, if not properly connected therewith, it *could* not be by the express terms of the constitution.

If the acts of the *same* corporation were too remote to be legalized by an amendment to its charter, there certainly ought to be but little room for argument as to whether those of another or of other corporations, and relating too, to an entirely different matter, should be so held. In the absence of decisions by the highest court of the state that this court will pass upon the constitutionality of state statutes, is entirely settled.

Burgess vs. Seligman, 107 U. S., 20.
Carroll County vs. Smith, 111 Id., 556.

Of course the conflict must be palpable. In this case we think it is.

We call your Honors' attention too. to what is said in the latter case upon the subject of *recitals*, page 561.

FOURTH.

The finding "*finds for the plaintiff*" was insufficient (Tr. p. 13).

First, it should have found the amount, that was a matter of *evidence* and not of mere computation upon the allegations of the petition; second, it should have found upon defendant's counterclaim, fourth division of its answer, p. 4.

The act of congress says: the finding *shall have the same effect as the verdict of a jury*, and this court held—as we understand all courts to hold—in *Prentice vs. Zane*, 8 How., 483, that "a verdict which finds but part of the issue and says nothing about the rest, is insufficient, because the jury have not tried the whole case," and in citing this case in *Graham vs. Bayne*, 18 How., 63, the court said that a verdict which finds but a part of the issue and is silent as to the others is a mistrial, it is a mistake and the court of error must order a *venire de novo*, they can render no judgment on an imperfect verdict.

There was no finding other than the announcement orally by the court that it found for plaintiff with directions to the clerk to *assess* the amount. The *finding* and judgment were excepted to. (Tr., p. 13).

REVIEW

Of the Argument of Counsel for Defendant in Error.

At this point we have *exchanged* with counsel upon the other side, and shall close this argument, with a brief examination of their positions and authorities:

First. What will be reviewed by this court without a bill of exceptions.

1. As we understand it this court will always where jurisdiction depends upon citizenship, of its own motion reverse the judgment unless the record affirmatively shows a case within the jurisdiction of the Circuit Court.

2. That a bill of exceptions is never necessary when the matter sought to be reviewed necessarily makes a part of the record.

The cases cited by counsel in addition to those cited by our selves in our judgment neither add to nor take away from these cited by us, indeed, we suppose the rule to be one of so constant recognition by this court that the citation of authorities might with entire propriety have been omitted, and see—

U. S. vs. King, 7 How. 853.

In *Boers vs. Preston*, 111 U. S., 255, this court said, as I understand it to have said in substance *many* times before—

"The courts of the Union, being courts of limited jurisdiction, the presumption is that it is without their jurisdiction unless the contrary appears from the record."

Second. Are the bonds in suit promissory notes negotiable by the law merchant?

We have said what seemed to us pertinent to the question of the jurisdiction of the Circuit Court as dependent upon that question, but if counsel's five *certainties*—page four of his original brief—are the proper tests and what is said on page four in reply to our brief, to the effect that these bonds were by operation of law payable at any time before the day of payment named upon

X in every stage of the cause

their face, at the pleasure of the district, the fourth of these certainties is wanting, *they are not payable at a time certain* but at any time.

Hubbard vs. Mosely, 11 Gray, 172.

A note payable at any time before maturity at the option of the maker is not negotiable.

Way vs. Smith, 111 Mass., 525.
Stults vs. Silva, 119 Id., 137.

So far as I am able to ascertain this court has never passed upon the question of the negotiability of paper so drawn.

In his citation of authorities upon the question of jurisdiction, counsel it seems to us fails *fully* to distinguish between paper payable to *bearer*, and upon which any body may sue simply because he holds the paper, and as to which, it is quite immaterial whether it was in the proper commercial sense *negotiable* or not, or as to how many of the *five certainties* were wanting, and paper payable to A. B. or *order*, and upon which no assignee can maintain an action in the Circuit Courts of the United States unless he can and does show, either that his assignor might have done so, or unless the paper is upon its face of a kind to make it unecessary under the act of Congress for him to do so, in this case a promissory note negotiable at the law merchant.

The *City of Lexington vs. Butler* was not only upon *detached* coupons payable to *bearer*, but was a removal case, and by the settled law of this court it was immaterial whether they or the bonds were negotiable or not.

Thompson vs. Perrine was also upon coupons payable to bearer. The court said, as it had said probably a hundred times before, that they were payable to *anybody* that the holder was not an assignee and, therefore, not affected by the dis-

abilities of the nominal payee. It is not necessary that such a party should bring himself within the *exception* to the act, he is not within its enacting clause. In *Chickaming vs. Carpenter* the bonds were payable to bearer. We make and have made no question that as to such paper, the holding of this court has always been that the holder, himself possessing the requisite citizenship, could maintain an action in the federal courts, but the other branch of the rule is equally ancient, that if the paper was payable to order *it* must be of a *kind* named in the exception contained in the act. In *White vs. Vermont R. R. Co.*, the bonds were issued in blank and filled up by the holder, a citizen of another state by inserting his own name. *Manufacturing Company vs. Bradley* differs from the others only in this, the *Bond* was by its terms not negotiable, but the *maker*, ~~not some subsequent holder or assignee~~, by an endorsement upon it, while it was still in the hands of the original taker, promised to pay it to the *bearer*, and in *that* form it was afterwards transferred to Bradley, the complainant in the suit, who possessed the requisite citizenship. The case was *prima facie* within the jurisdiction of the Circuit Court, it was not necessary in order to give it jurisdiction that the complainant should show how he got the paper, within all the authorities being payable to bearer it was payable to *him*, and certainly nobody would claim that the jurisdiction of the court having rightfully attached could be *ousted* by a presumption. I do not suppose the case would have been be different if the fact had been admitted that the citizenship of the original taker was not such that he could have maintained an action upon it in the federal courts. I do not understand counsel in that case to have made that claim. On the contrary as I understand the case they supplemented what there was of that, by the further claim, that the nominal plaintiff was not the real owner.

Third—As to the form of the bonds and whether the statute in effect requires that they should be executed in any particular way.

Our ideas upon this subject are contained in our brief, as originally prepared.

The purpose was to borrow money, to get the face of the bonds by selling them, not to deliver them to a contractor who would make his terms accordingly. Second, that the formality of their execution and sale should be such that the district would have the security of the treasurer's official bond. Third, the act is *notice* to the purchaser that the bonds were to be delivered to the treasurer in a form which would enable him to sell them *in the market*, not to some *one* person or party, but to *him* or *any* one.

There can be no presumption as to the party to whom they were *delivered* contrary to the allegation of the petition, which is that they were delivered to Foster Brothers, and there is no allegation that they *bought* them, or that they were not in their present condition when delivered to them, on the contrary the allegation is—"*That the said bonds were each and all made payable to the order of Foster Brothers—Did execute and deliver to Foster Brothers payees therein.*"—Tr. pp. 2, 3.

As to the strictness with which boards of public officers should follow the statutes from which they derive their authority. *Bissell vs. Spring Valley Township*, 110 U. S. 169, is well in point. We do not see anything in *Lincoln vs. Iron Company* that we would be bold enough to question, or which is at all in conflict with what we maintain.

Time of Payment—

As we understand the statute, it requires that the bonds should in terms be made payable at the pleasure of the district. Its language is—

If a majority of all the votes cast on that question be in favor of such loan, then the said school board *shall issue bonds* * * * due not more than ten years after date, *and payable at the pleasure of the district at any time before due.*

It might as well be argued, it seems to us, that the bonds would have been valid, if they had said *nothing* as to the time of payment, *because* by operation of law they *must* become due at the end of ten years. It is possible, the power existing to issue bonds, that an instrument of that kind might be a valid obligation, but it certainly would not be a negotiable promissory note, as between individuals the law is well settled, that a promissory note with no time of payment named in it is payable on demand.

Coupons—

Counsel says that the coupons are payable to the holder. He also says, and so is the petition, that they were *attached to the bonds.* We understand the law, as settled by this court, to be that it is only by being severed from the bonds that coupons become independent instruments.

In *The City vs. Lamson*, 9 Wall., 438, the court said: "The coupon is not an independent instrument like a promissory note for a sum of money, but is given for interest thereafter to become due *upon the bond*, which interest is parcel of the bond." And upon the next page: "There is but one contract and that evidenced by the bond." Of course we do not in the face of the decisions of this court question that when *severed* they may be sued upon without producing the bond, but it would be a novelty if so long as they remain attached, a federal court would take jurisdiction of the incident while refusing to do so of the principal.

Clark vs. Iowa City, 20 Wall., 587.

In *Thompson vs. Perrine* it was held that *detached* coupons

so far partook of the nature of the bonds, that their negotiability depended upon whether the bonds were or were not past due, although the coupons were past due.

It is only because they partake of the nature of the bonds, that instruments in *this* form, are in any case negotiable. They are mere *orders* by one officer upon another, and while the holder may sue upon them in his own name they are subject to all legal and equitable defences which existed to them in the hands of the payee.

Wall vs. County of Monroe, 103 U. S. 77.

That one suing upon coupons is chargeable with all that the bonds contain and the requirements of the statute under which they purport to have been issued was decided by this court in *McClure vs. Oxford*, 94 U. S., 426.

Where the corporation has no *general* power to issue instruments of the kind sued upon the power must appear either by averment or recitals. In this case it is not averred and according to the decision of this court in the Steamboat Rock case the recitals do not import that the bonds were issued in *accordance with the act* under which they purport to have been issued.

Kennard vs. Cass Co., 3 Dillon, 149.

GALUSHA PARSONS AND JOHN F. DUNCOMBE,

Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
NOV 26 1884
JAMES H. McKENNEY,
CLERK

113-134

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 119.

THE INDEPENDENT SCHOOL DISTRICT OF ACKLEY, HARDIN COUNTY, IOWA, PLAINTIFF IN ERROR,

vs.

F. G. HALL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IOWA.

Brief and Argument for Defendant in Error.

C. C. NOURSE & B. F. KAUFFMAN, FOR DEFENDANT IN ERROR.

P. C. KENYON, Publisher Law Briefs, Des Moines, Iowa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1384.

THE INDEPENDENT SCHOOL DISTRICT OF ACKLEY, HARDIN CO., IOWA, *Plaintiff in Error,*

vs.

F. G. HALL, *Defendant in Error.*

In Error to the Circuit Court of the United States for the District of Iowa.

No. 119.

C. C. NOURSE & B. F. KAUFFMAN, *for Defendant in Error.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

On the 22d day of November, 1878, the defendant in error, F. G. Hall, brought his suit in the United States circuit court for the district of Iowa, against the Independent School District of Ackley, in Hardin county, Iowa, upon eight school bonds of $500.00 each, said bonds having attached thereto interest coupons for the semi-annual installments of interest accruing upon the bonds. A copy of one of the bonds was attached to the petition and is in the following form:

No. I. $500.00

Independent School District, Ackley, Hardin County, Iowa.

The Independent School District of Ackley, Hardin county, Iowa, promises to pay to Foster Brothers or order, at the Hardin County Bank, at Eldora, Iowa, on the 1st day of May, 1872, five hundred dollars for value received, with interest at the rate of ten per cent. per annum, said interest payable semi-annually on the 1st day of May and November in

each year hereafter at the Hardin County Bank at Eldora on the presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of school directors by authority of an election of the voters of said school district held on the 23d day of August, 1869, in conformity with the provisions of chapter 98, acts of the twelfth general assembly of the state of Iowa.

In testimony whereof, the said Independent School District, by the board of directors thereof, have caused the same to be signed by the president and secretary this 1st day of November, 1869.

(Signed) W. H. ROBERTS,
President of Board of Directors.
S. S. LOCKWOOD,
Secretary of Board of Directors.

COUNTERSIGNED:
F. EGGERT,
Treasurer School District.

The other bonds are of like tenor and effect except as to the time of maturity.

A copy of one of the coupons attached is as follows:

Treasurer of Independent School District, Ackley, Hardin county, will pay the holder hereof on the 1st day of November, 1874, at the Hardin County Bank, at Eldora, Iowa, twenty-five dollars for interest due on school-house bond No. 8.

(Signed) W. H. ROBERTS, *President.*
S. S. LOCKWOOD, *Secretary.*

The Independent School District of Ackley appeared in the court below and answered.

On the 5th day of November, 1880, the parties, by stipulation waiving a jury trial, agreed to submit the case to the court upon both law and fact (record, p. 12). Thereupon the case was heard November 6, 1880, resulting in judgment for plaintiff in the sum of $7,362.84, to which judgment defendant excepted.

No evidence was preserved and no bill of exceptions was signed or filed, and no special findings made by the court. Nothing to show, except as already indicated in the statement, what was heard and determined in the court below.

A writ of error was allowed the defendant, and bond given, and the case is now in this court for determination. No assign-

ment of errors was returned with the writ of error to this court, but on motion to dismiss or alternatively for an affirmance for failure to assign errors, this court held, 106 U. S., page 428, that ordinarily it was sufficient that an assignment of errors be filed with the brief of counsel for plaintiff in error.

ARGUMENT.

This brief is prepared before the brief for the plaintiff in error has been submitted to us. At the time of the submission of the motion to which reference has been made in the statement of the case, counsel then assigned as the only error a question as to the jurisdiction of the federal court, claiming that the court had no jurisdiction because it did not appear from the record that Foster Bros., the payees in the obligation, could have maintained an action on the bonds in their own name in said court.

This is the only point, so far as we are advised at the time of the preparation of this brief, that counsel for plaintiff in error expect to make in the case, and they so state in their brief on the motion to dismiss and affirm; and, indeed, it seems to be the only one that it is possible to make, for, in view of the method of submission, and the fact that no bill of exceptions was signed, and none of the evidence preserved, and no finding of facts had, there is nothing before the court for determination.

Gould vs. Frontin, 18 How., 135.
Sugdam vs. Williamson, 20 How., 427.
Campbell vs. Bogreau, 21 How., 223.
Kelsey vs. Forsythe, 21 How., 85.

We therefore address ourselves briefly to the jurisdictional question as made by plaintiff in error.

The first section of the act of March 3, 1875, provides:

> That no court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.

And plaintiff in error, as we understand the point, claims

First, That the bonds in suit are not negotiable by the law merchant, within the meaning of this provision; and he claims

Second, That if they are not thus negotiable the record must affirmatively show, not simply that the requisite citizenship existed as between plaintiff and defendant, the parties to the suit, but that Foster Bros., the payees, were residents of a state other than Iowa, of which the defendant, the independent school district, is a citizen, and that therefore they might have brought suit upon the obligation in the federal court.

We submit that neither of these positions is tenable.

First. The bonds in suit are clearly negotiable. We have called them "bonds." The counsel for plaintiff in error likewise so designates them, but if by this it is intended to imply that the instruments are bonds, within the technical meaning of the term as it was understood at common law, then these obligations are not bonds. They are not sealed instruments. They contain every essential of a negotiable promissory note, and contain nothing to impair or affect their negotiability.

There are five elements of certainty that constitute the essential requisites of a negotiable promissory note: 1st. Certainty as to the person who shall receive the money agreed to be paid. 2d. Certainty as to the party who is to make payment. 3d. Certainty as to the amount to be paid. 4th. Certainty as to the time of payment. 5th. Certainty as to the fact of payment.

Parsons on Notes and Bills, Vol. I, page 30.

Inviting attention to the form of this obligation before set out, it will be found to contain each of these essential elements, and certainly there is nothing in the bond that detracts from its negotiable character. It is simply and only an obligation to pay money to a certain person at a given time, and upon a certain condition, and in a given amount, and by the obligor, to-wit: The Independent School District of Ackley, and it is nothing more than this. It is signed by the officers of the

school district, who are authorized to execute the written obligation, and no seal is required and none is attached.

The obligation is issued under the provision of chapter 98, of the laws of 12th general assembly of Iowa, approved April 6, 1868. The provisions of the first section of this law, authorizing their issue, is as follows:

> Independent school districts shall have the power and authority to borrow money for the purpose of erecting and completing school houses, by issuing negotiable bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not to exceed ten per centum per annum, which interest may be paid semi-annually, which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall have been made.

It is to be noticed that this law authorizing the issue of the obligations, expressly declares them to be negotiable. They are issued for the purpose of sale upon the market, they are termed by the law authorizing their issue, "negotiable" instruments, and investors are invited to buy them as such.

In no sense, therefore, are they wanting in any of the elements rendering them negotiable, and they are strictly so by the law merchant.

The bonds in suit are endorsed in blank by Foster Bros. (see petition, record p. 2), and thereby pass from hand to hand by delivery.

The case of *The City of Lexington vs. Butler*, 14 Wall., 283, is a case where bonds like those now in suit were made payable to order, and assigned to bearer, and the jurisdiction of the federal court was maintained.

The interest coupons in this suit are payable "to the holder," and of course pass by delivery and without endorsement.

Under the judiciary act of 1789 it has always been held that instruments payable to bearer may be sued upon by the holder thereof in the federal court, if the requisite citizenship exists as between himself and the defendant, irrespective of the citizenship of the payee.

The provisions of that act are much more restricted than those of the act of March 3, 1875.

The judiciary act of 1789 provides that—

> The federal court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in the cases of foreign bills of exchange.

The proviso in the act of March 3, 1875, states that said courts should not—

> Have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made except in the cases of promissory notes negotiable by the law merchant and bills of exchange.

Thus adding the important words that give jurisdiction in suits on promissory notes negotiable by the law merchant and all bills of exchange.

See the cases of—

Thompson vs. Perine, 106 U. S., 589.
Chickaming vs. Carpenter, 106 U. S., 663.
Lexington vs. Butler, *supra*, 14 Wall., 283.

We have already called attention to the fact that under the very terms of the statute authorizing the issue of these bonds they are made negotiable. They are intended for negotiation. They are so denominated by the law which gives them birth.

We have, then, a case where the maker issues the paper as negotiable. They are received as such, treated as such, denominated as such by solemn legal declaration, and the courts will consequently so treat them.

That these considerations are of great weight in determining the question of the negotiable character of obligations see—

White vs. Vermont, etc., R. R. Co., 21 How., 575.
Manufacturing Co. vs. Bradley, 105 U. S., 175.

In the first of the above cases the bonds were issued by the railroad company payable in blank to a citizen of same state as the defendant company, but ultimately came into the hands of the plaintiff, living in New Hampshire.

The court discuss at some length the intent of the railroad company in issuing the bonds payable in blank, and among other things say:

> If the utmost latitude in this respect was not intended, why leave the payee in blank, when issuing the bonds, or why not fix the limit of negotiability or negative it altogether.

The opinion of the court proceeds as follows:

> As to the negotiability of this class of securities when shown to be intended that they should possess this character by the form in which issued and mode of giving them circulation, we think the usage and practice of the companies themselves and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognitions of the principle by the courts and judges of the highest respectability, have settled the question. (*Morris Canal Co. vs. Fisher*, 1 Stockton, 667, 699; *Delfield vs. State of Illinois*, 2 Hill, N. Y., 177; 8 Paige Ch. R., 527, S. C.; *Mich. Bank vs. N. Y. & N. H. R. R. Co.*, 3 Kern. R., 625; *Carr vs. Le Fevre*, 27 Penn. R., 418; *Craig vs. City of Vicksburg*, 31 Miss. R., 216; *Chester W. Chapin vs. The Ver. & Mass. R. R. Co.*, decided September 7, 1857, in Supreme Court of Massachusetts.)
>
> Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day would be impaired. Within the last few years large masses of them have gone into general circulation, and in which capitalists have invested their money, and it is not too much to say that the great share of the confidence they have acquired as a desirable security for investment is attributed to this negotiable quality as well on account of the facility of passing from hand to hand as the protection afforded to the *bona fide* holder.

The other case above cited of *Manufacturing Company vs. Bradley*, 105 U. S., 175, 180, is still more pertinent. The Manufacturing Company had executed its obligation to Wm. J. Gayer, receiver of court, without words of negotiability. This bond afterwards came into the possession and ownership of one D. T. Corbin. Shortly after an indorsement was made on

the bond by the manufacturing company in which it agreed to pay the bond to bearer. This indorsement was under the seal of the company. Corbin thereafter sold the bond to Bradley, a citizen of Massachusetts, who brought suit on it in the federal court for the district of South Carolina.

The court thus treat the first question presented:

> Several questions arising upon the pleadings and evidence and embodying the errors assigned upon the decree, will be considered in their order.
>
> 1. The first of these relates to the jurisdiction of the court. It is objected in the first place that the complainant is the assignee of a chose in action on which no suit could have been maintained in the circuit court by his assignor, and that consequently he is within the prohibition of the first section of the act of March 3, 1875, chapter 137. The answer to this objection is that the obligation sued on is a negotiable promissory note, and is, therefore, excepted out of the prohibition relied on. It is true that the bond as originally executed was payable to Gayer, receiver, simply and was not negotiable; but the subsequent endorsement was a new and complete contract upon a distinct and sufficient consideration, and being payable to bearer is negotiable by delivery merely. It is a negotiable note within the meaning of the law merchant, and according to the place of contract, notwithstanding it is an instrument under seal. *Langston vs. South Carolina, R. R. Co.*, 2 S. C., 248; *Bank vs. R. R. Co.*, 5 Id., 156; Bond Debt Cases, Id., 12, 200, 250.

It will be noticed that the instrument in question, in the above case, was under seal, but because plainly intended as a negotiable instrument, and held to be such by the decisions of Supreme Court of South Carolina, and having words of negotiability it was such by the law merchant within the meaning of the act of 1875, notwithstanding it was under seal.

But in the case at bar we have an ordinary instrument not under seal, and possessing, as we have seen, all the elements of negotiable paper, and being expressly so recognized by the laws of Iowa, and by the very law authorizing its issue.

Second. But, if the position of counsel were true as to the non-negotiable character of these instruments, still there is no error in the record, for this court will not assume as against the jurisdiction of the court below, that Foster Bros. were citi-

zens of Iowa. On the contrary, where the requisite citizenship exists, as between the parties to the suit to give jurisdiction, the necessary favorable presumption as to the citizenship of other parties will be indulged rather than that the jurisdiction of the court should be defeated.

Upon this point we have the clear and explicit authority of the recent case of *Manufacturing Co. vs. Bradley*, 105 U. S., p. 175, already cited.

We quote again from the opinion:

> It is further objected, however, that the transaction between Corbin and Bradley was fictitious, and not real; that the title to the bond remained in the former, so that the latter, not being the real party in interest, cannot maintain an action to enforce it; that the present suit is collusive, for the purpose of conferring jurisdiction upon the circuit court, and therefore within the rule declared in *Smith vs. Kernochen*, 7 How., 198; *Jones vs. League*, 18 Id. 76, and *Barney vs. Baltimore City*, 6 Wall., 280, and enacted by the fifth section of that act as construed in *Williams vs. Nottawa*, 104 U. S., 209.
>
> The delivery of the bond by Corbin to Bradley, under the arrangement we have mentioned was, however, a transfer of the legal title to the obligation. Whether the agreement was not also a transfer by Corbin of all beneficial interest in the bond, depends on whether Bradley was bound to account to him specifically for the net proceeds of its collection, or only to pay him so much money as they should amount to, a question which it is not necessary to decide, because it does not appear from this record, but that Corbin could himself have maintained a suit in his own name, in the circuit court, upon the bond.
>
> It is nowhere distinctly alleged or shown that at the time this suit was brought he was a citizen of South Carolina.
>
> That he was so at the time of the original transaction, may be presumed or inferred from the circumstances, but to confer or oust jurisdiction when that depends on citizenship, the necessary facts must be distinctly alleged, and admitted or proved.
>
> Upon the present state of the record the assumption could not have been made in his favor to sustain the jurisdiction if he were seeking, as a citizen of South Carolina, to prosecute a suit, and equally it will not be made to defeat the jurisdiction which otherwise is rightfully invoked by the complainant.

We call attention especially to the last sentence quoted in the above opinion. It is here expressly held that no presumption

will be indulged to defeat the jurisdiction of the court as to the residence of Corbin, the assignor, at the time the suit was brought by Bradley, and it is distinctly held if the citizenship of Corbin be not distinctly proved that there will be no presumption as to his citizenship that would defeat the jurisdiction otherwise rightfully invoked.

That Hall, the original plaintiff in this suit, was a citizen of New York, while the Independent School District of Ackley was a citizen of Iowa, is conceded. The court therefore had jurisdiction of the controversy between these parties. In order to defeat it, counsel ask that a presumption be indulged as to the citizenship of Foster Bros., the record being wholly silent on that subject. This cannot and will not be done.

We ask an affirmance of the case, and it appearing as we think, that the appeal is taken for delay only, we submit that it should be affirmed with damages.

Respectfully submitted.

C. C. NOURSE AND
B. F. KAUFFMAN,
For Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE INDEPENDENT SCHOOL DISTRICT OF ACKLEY, *Plaintiff in Error,*

vs.

F. G. HALL, *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Having been served with argument for plaintiff in error since the foregoing argument was printed, we now give brief notice to it as a part of our argument for defendant in error.

Counsel have given us a new test of what constitutes a negotiable instrument, to-wit:

> No paper which does not, in the hands of a *bona fide* purchaser, exclude all defenses based upon equities between the original parties is negotiable by the law merchant.

This statement, of what is claimed to be the test, is followed by the statement as applied to municipal bonds that their negotiability depends upon the recitals they contain, and is, in substance, that unless the recitals are broad enough to exclude *all* defenses the instruments are not negotiable.

The propositions have the merit of novelty but are wholly without support in the law.

We had always supposed that the negotiability of an instrument depended upon its form and character. To use a homely phrase we submit that the gentleman has "placed the cart before the horse."

He insists that it is the quality that excludes defenses that

makes instruments negotiable, while we submit that it is the negotiable qualities of the instrument that exclude the defenses.

If it were true that paper is only negotiable where all defenses are excluded we would have no such thing as negotiable paper, for any kind of paper is subject to certain defenses as infancy, coverture, insanity, want of authority if made by an agent, forgery, etc.

Counsel apply this erroneous proposition to this case by claiming that inasmuch as this court held in the Stone case that similar recitals to those contained in the bonds in suit did not exclude the defenses, that the bonds were issued in excess of the constitutional limitation, therefore they are vulnerable to one supposed defense and therefore not negotiable.

It has always been true that the want of authority on the part of the persons executing commercial paper of all kinds where it purports to be executed by an agent may be shown as against a *bona fide* holder for value.

See—

Marsh vs. Fulton County, 10 Wall., 683.

Floyd Acceptances, 7 Wall., 676.

In this last case this court used the following language:

An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power.

But in each case the person dealing with the agent knowing that he acts only by virtue of a delegated power must, at his peril, see that the paper on which he relies comes within the power under which the agent acts.

And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.

These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind the

government, it must necessarily be by the signature of an officer of the government and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

It has always been true that all negotiable paper issued by corporations, public or private, is subject to the defense, no matter by whom held that it was issued without authority.

Of course, we do not overlook the equally well established rule that if the authority exists, the purchaser may rely upon the presumption of its proper exercise.

Rogers vs. Burlington, 3 Wall., 654, 666.

But in all cases he is bound to know that the authority existed; and such is the rule as we have already seen in all cases where individuals are sought to be held upon paper executed by persons assuming to be their agents.

II.

Counsel next maintain that though the instruments may be negotiable they are not promissory notes.

In reply to this we may well adopt the concession of counsel, "that names mean nothing when things are the same."

Under the law authorizing the issue of these bonds no form was prescribed, and upon examination of the form of the instrument sued upon, nothing will be found in it that could be omitted from a promissory note strictly so-called, except the recitals (see Abs., p. 3), and counsel will not insist that the existence of the recitals affects the instrument, for he is claiming that its fault is that it has not more. The reference counsel make to section 2084 of the Code of 1873 of Iowa, is unfortunate for them. We quote it literally: "Bonds, due bills and all instruments in writing, upon which the maker promises to pay to another, *without words of negotiability*, a sum of money * * * are assignable," etc. It will thus be seen that here is a plain recognition of facts well known to the legislature when the section was enacted, not only that bonds

might be negotiable, but that they had already authorized by various statutes municipal and school corporations to issue negotiable paper, commonly called bonds, and this class of negotiable instruments is, therefore, excluded by express provision from this section, instead of being included, as counsel seem to infer.

We have already shown in our brief first prepared, accompanying this, that there are certain essential requisites of a promissory note. A written instrument possessing these requisites, and containing nothing to affect them in any way, is a promissory note, whatever may be its form. It is elemental doctrine that the form of a written obligation is immaterial if the essential requisites exist in it. The authorities cited in our first brief are sufficient upon this point, and it needs no further attention.

III.

It is next claimed that the petition does not state a cause of action; first, because the bonds were payable to order instead of to bearer. We need only say respecting this point, that the statute authorizing their issue contains no provision upon this point, but does provide for their negotiability and the use, therefore, of either of these words of negotiability would be a technical and literal compliance with the provisions that may be found in the statute upon this point. There is nothing in the statute that could possibly be construed as requiring as essential to the validity of the obligation that it should be made payable to bearer.

Counsel speak of the averment of the petition that the bonds sued on were delivered to Foster Bros., as though it implied that they were not delivered to the treasurer for negotiation. This is not the meaning of the averment. On the contrary, the bond, a copy of which is attached to the petition and made a part of it, shows, on its face, that it passed through the hands of the treasurer, and is countersigned by him (Abs.,

p. 3). The words in the petition are intended to aver that the instrument became *complete* by delivery.

That the petition is sufficient in its statement, see

Lincoln vs. Iron Co., 103 U. S., 412.

Mosher vs Ind Dist. 42 Ia 632

But it is claimed next that the petition sets out no cause of action, because the bonds do not recite that they are payable at the pleasure of the independent district before maturity. It is almost needless to say that the statute does not require such a recitation in the bonds. Whatever its effect may be upon the bond, and the time of payment, need not be determined here. If as a part of the law it gives to the district the option to pay the bonds before due by their terms, then the holder of the bond must hold it subject to this right, but the bond is not void because it does not, on its face, expressly so provide. Being issued under this law it is subject to the provisions therein contained.

IV.

It is lastly claimed that the act under which these bonds were issued is unconstitutional, because it is claimed that more than one subject is covered in its title. The objection is not assigned as error, and therefore we might pass it over without notice, but it is wholly without merit.

It was held in *State of Iowa vs. County Judge, Davis County*, 2 Iowa, 280: "The unity of object is to be looked for in the ultimate end designed to be attained, and not in the details and steps leading to that end."

And again, in the same case the court say:

> The intent of this provision of the constitution was to prevent the union in the same act, of incongruous matter and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation by having matters of one nature embraced in a bill whose title embraced another. It is manifest, however, that there must be some limit to the division of matter into separate bills or acts.

In this case the object of the statute was stated to be "an

act in relation to certain state roads therein named," and was held to be constitutional.

Without discussing each case, we beg to cite the following additional cases upon the subject:

Santo vs. State, 2 Ia., 165.
Morford vs. Unger, 8 Ia., 82.
Davis vs. Woolnough, 9 Ia., 104.
Whiting vs. City of Mt. Pleasant, 11 Ia., 482.
Duncombe vs. Prindle, 12 Ia., 1.
McAunich vs. M. & M. R. R., 20 Ia., 338.
Porter vs. Thompson, 22 Ia., 391.
Farmers Ins. Co. vs. Highsmith, 44 Ia., 330.
State vs. Wells, 46 Ia., 662.
State vs. Schrader, 51 Ia., 197.

Under the provisions of the act in question large quantities of bonds have been issued and the constitutionality of the act has never been doubted by the courts or the profession of the state of Iowa, though issues of bonds made thereunder have frequently been the subject of litigation in the courts of the state.

Respectfully submitted.

C. C. NOURSE AND
B. F. KAUFFMAN,
for Defendant in Error.

In Mershon v. 2nd Dist. 42 Ia 632 the Supreme Court expressly recognize the validity of this act

113-135

OFFICE SUPREME COURT U.S.
FILED
DEC 4 1882
JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY

vs.

F. G. HALL.

No. 725.

Error to the United States Circuit Court, Central Division, Iowa.

This is a motion to dismiss the writ of error and affirm the judgment of the court below for the following reasons:

1. There was no assignment of error annexed to or returned with the writ of error, as required by section 997 of the Revised Statutes.

2. There is no error in the record, nor anything upon which error can be predicated.

3. It is evident that the writ was sued out for delay only.

The action was founded upon sundry negotiable bonds, executed by the defendant below, now plaintiff in error, and delivered to Foster Brothers in payment for a school-house, which they agreed to erect for the defendant below. The bonds recite the act of the legislature under which they were issued and a compliance with its provisions.

The defendant below, now plaintiff in error, filed its answer, in which it set up sundry matters which it alleged rendered the bonds void. To this answer there was a reply

putting in issue all the allegations contained in the answer; and also one alleging that the plaintiff below obtained title to said bonds by purchase from one who had purchased them for value before due, and without notice of any defect in them.

The case was tried by the court without the intervention of a jury, and judgment rendered against the defendant below on the 6th of November, 1880, for $7,362.84, with interest at ten per cent.

There was no demurrer, no bill of exceptions, nor anything else to indicate that there was error in the proceedings below. There is now nothing in the record that can by possibility raise any question of law. It is very clear that the writ is prosecuted for delay.

We therefore ask, on the authority of *Micas* vs. *Williams*, 104 U. S., 556, that our motion may be sustained.

We also ask that the court will impose the penalty of ten per cent. provided for in its 23d rule.

A. T. BRITTON,
W. H. SMITH,
Att'ys for Def't in Error.

113-135

OFFICE SUPREME COURT U.S.
FILED
DEC 4 1882
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

October Term, 1882.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY

vs.

F. G. HALL.

No. 725.

Reply to Brief of Plaintiff in Error.

The argument of counsel for plaintiff in error presents but a single point in opposition to our motion to dismiss and affirm. That point is that the circuit court had no jurisdiction, because it does not appear from the record that Foster Brothers, the payee of the bonds, could maintain an action on them in their own name, and because the case is within the prohibition of the first section of the act of March 3, 1875. That section provided that no circuit court shall "have cognizance of any suit founded on contract in favor "of an assignee, unless a suit might have been prosecuted "in such court to recover thereon if no assignment had "been made, *except in cases of promissory notes negotiable "by the law merchant and bills of exchange.*"

The petition shows that this suit was founded upon eight negotiable bonds with coupons attached, executed by the plaintiff in error, payable to Foster Brothers or order, and

by them indorsed in blank, and that the defendant in error became the purchaser of the same.

The following is a copy of each of said bonds, except as to number and date:

"No. 1. $500.00.

"Independent School District, Ackley, Hardin county, "Iowa.

"The Independent School District of Ackley, Hardin "county, Iowa, promises to pay to Foster Brothers or order, "at the Hardin County Bank, at Eldora, Iowa, on the 1st "day of May, 1872, five hundred dollars, for value received, "with interest at the rate of ten per cent. per annum, said "interest payable semi-annually on the 1st day of May and "November in each year thereafter at the Hardin County "Bank, at Eldora, on the presentation and surrender of the "interest coupons hereto attached.

"This bond is issued by the Board of School Directors "by authority of an election of the voters of said School "District held on the 23d day of August, 1869, in conformity "with the provisions of chapter 98, acts 12 General Assem- "bly of the State of Iowa.

"In testimony whereof the said Independent School Dis- "trict, by the Board of Directors thereof, have caused the "same to be signed by the President and Secretary this 1st "day of November, 1869.

"W. H. ROBERTS,
"*President of the Board of Directors.*
"S. S. LOCKWOOD,
"*Secretary of the Board of Directors.*

"Countersigned:

"F. EGGERT,
"*Treasurer of School District.*"

The following is a copy of each coupon, except as to number, amount, and date:

"Treasurer of Independent School District, Ackley, Har-

" din county, Iowa, will pay the holder hereof on the first " day of November, 1874, at the Hardin County Bank at " Eldora, Ia., twenty-five dollars, for interest due on school- " house bond No. 8.

" W. H. ROBERTS,
" *President.*

" S. S. LOCKWOOD,
" *Secretary.*"

We concede that the record does not show the citizenship of the Foster Brothers. It is silent on that subject.

The only reference to the question of jurisdiction in the entire record is found in the motion to set aside a judgment which had been taken by default, and is in these words:

" 1. This court has no jurisdiction of the cause of action."

The case was tried by the court without the intervention of a jury, and judgment rendered in favor of the defendant in error. There is nothing in the record to show what the evidence was, nor what objections were made to the recovery. There is no bill of exceptions. We are, therefore, left to the presumption that the evidence justified the judgment. There is no way of attacking it now, except on the ground that the court had no jurisdiction.

Waiving the question whether the objection, as now made, does not come too late, not having been made in the court below, we think it clear that the court had jurisdiction.

It would have had if the action had been prosecuted under the 11th section of the judiciary act of 1879.

White *v.* Vermont and Mass. R. R., 21 How., 575.
Thomson *v.* Lee County, 3 Wall., 330.
Bushnell *v.* Kennedy, 9 Wall., 390.
City of Lexington *v.* Butler, 14 Wall., 293.

That it has jurisdiction under the act of 1875 is no longer an open question. It has been settled by the decision of this

court. It was virtually conceded in the case of Williams *v.* Nottawa, 104 U. S., 209.

That was an action in the circuit court of Michigan, by Williams, a citizen of Indiana, against the township of Nottawa, a municipal corporation of Michigan, to recover the amount due on certain municipal bonds, made payable to Samuel Kline or bearer. Kline, at the time the bonds were issued, was a citizen of the State of Michigan, and there was no evidence of any change of citizenship up to the time the suit was brought. One Tobey had transferred some of the bonds to Williams; but there was no evidence to show of what State he was a citizen.

There was no suggestion either by counsel or the court that the circuit court had no jurisdiction. The case, it is true, went off on other grounds, but it is hardly possible that the question of jurisdiction would have been overlooked by both counsel and court.

The question came directly before this court in the Marine and River Phosphate Company *v.* Bradley, decided at the last term of this court, and not yet reported, except in 4 Morrison's Transcript Rep., 384.

Bradley brought suit in the circuit court of South Carolina against the company upon a written obligation in these words:

"STATE OF SOUTH CAROLINA, }
"*Charleston County.* }

"Know all men by these presents that we, the Marine "and River Phosphate Mining and Manufacturing Company "of South Carolina, are held and firmly bound unto Wil- "liam J. Gayer, receiver, in the sum of twenty thousand "dollars, with interest thereon at the rate of ten per cent. "annually, payable semi-annually, to be paid on the 1st day "of July next ensuing the date hereof, for which payment, "well and truly to be made, we, the said company, do here- "by bind ourselves and our successors firmly by these pres- "ents.

"In witness whereof the said company have caused their "seal to be hereunto affixed the 28th day of December, "A. D. 1872.

"We, the said company, do further covenant and agree "that the above bond constitutes a lien upon the property "of the said company, and that the same is issued under "and pursuant to the provisions of section thirty-nine of "chapter sixty-four of the general statutes.

"D. T. CORBIN,

"*President Marine and River Phosphate Mining and*
"*Manufacturing Company of South Carolina.*

"Countersigned:

"REUBEN TOMLINSON,
"*Treasurer.*"

And sealed with the corporate seal.

After the bond matured one C. C. Puffer, successor to Receiver Gayer, April 2, 1874, transferred and delivered this bond to D. T. Corbin in exchange for 300 shares of stock in the Phosphate Company.

May 13, 1874, the following indorsement was made upon the bond:

"In consideration of forbearance on the part of the holder "of this bond till the 1st day of January, A. D. 1875, the "Marine and River Phosphate Mining and Manufacturing "Company of South Carolina hereby promises, waiving all "set-off or other defense, to pay this bond to bearer on the "1st day of January, A. D. 1875, with interest at the rate "of twelve per cent. per annum from the 1st day of April, "1874, payable quarterly; and should said bond not be paid "on the 1st day of January next, then thereafter interest "shall be paid in the same manner and at the same rate as "herein mentioned till paid."

This indorsement was under the seal of the company, and was signed in the same manner as the bond.

In June, 1877, Corbin transferred and delivered the bond

to Bradley, a citizen of Massachusetts, who, in July, 1877, brought his suit in the circuit court.

2. It was objected that the court had no jurisdiction.

Mr. Justice Mathews, in delivering the opinion of the court, said:

"It is objected, in the first place, that the complainant "is the assignee of a chose in action on which no suit could "have been maintained in the circuit court by his assignor, "and that consequently he is within the prohibition of the "first section of the act of March 3, 1875. The answer to "this objection is that the obligation sued on is a negotiable "promissory note, and is therefore excepted out of the pro- "hibition relied on. It is true that the bond as originally "executed was payable to Gayer, receiver, simply, and was "not negotiable; but the subsequent indorsement was a "new and complete contract upon a distinct and sufficient "consideration, and, being payable to bearer, is negotiable "by delivery merely. It is a negotiable note within the "meaning of the law merchant, and according to the law of "the place of the contract, notwithstanding it is an instru- "ment under seal. (Langston *v.* South Carolina Railroad "Co., 2 S. C., 251; Bank *v.* Railroad Co., 5 S. C., 158; "Bond Debt Cases, 12 S. C., 250.)"

The learned justice, after referring to the claim that the transaction between Corbin and Bradley was fictitious and the suit collusive, said that "is a question which it is not "necessary to decide, because it does not appear from this "record but that Corbin could himself have maintained a "suit in his own name in the circuit court upon the bond. "It is nowhere distinctly alleged or shown that at the time "the suit was brought he was a citizen of South Carolina. "That he was so at the time of the original transaction "may be presumed or inferred from the circumstances; but "to confer or oust jurisdiction when that depends on citi- "zenship, the necessary facts must be distinctly alleged "and admitted or proved. Upon the present state of the

" record the assumption could not have been made in his " favor to sustain the jurisdiction if he were seeking as a " citizen of South Carolina to prosecute an action; and " equally it will not be made to defeat the jurisdiction, which " otherwise is rightly invoked by the plaintiff below."

Apply this reasoning of the court to the present case. It does not appear from this record that Foster Brothers were citizens of Iowa *either at the time of the transfer of the obligations or the commencement of the suit*, and the court will *not presume* that such was the case for the purpose of ousting the jurisdiction which had already been invoked in favor of Hall, a citizen of Massachusetts.

There is another answer to the objection still more satisfactory than the above, and that is that the instruments sued upon are promissory notes, negotiable by the law merchant, and therefore within the express exception in the act of March 3, 1875.

They are not under seal, and in that respect differ from the only authority cited on the other side of Coe *vs.* R. R. Co., 8 Federal Reporter, 534.

In that case suit was brought on an obligation in these words:

" $10,000. " AURORA, N. Y., *May* 1, 1873.

" Five months after date the Cayuga Lake Railroad Com- " pany promises to pay to the order of Henry Morgan, " president, $10,000, at the office of Leonard, Sheldon & " Foster, No. 10 Wall street, New York city, value received, " with interest.

(Seal of Cayuga Lake Railroad Company.) " THE CAYUGA LAKE RAILROAD CO.,
" By HENRY MORGAN, *President.*
" L. DELAFIELD, *Treasurer.*"

This instrument was indorsed, " Henry Morgan, president."

It was transferred by the company to one James Stillman,

and by him to the plaintiff, Coe, who was a citizen of the State of Connecticut.

Morgan and Stillman were citizens of the State of New York at the time of the several transfers by them and at the commencement of the suit. Upon these facts Judge Blatchford held that the circuit court of New York had no jurisdiction, but he put his decision mainly upon the ground that the obligation sued on, being under seal, was a specialty and not a promissory note negotiable by the law merchant.

His decision is in conflict with Aurora *v.* West, 22 Ind., 88, and Phosphate Company *v.* Bradley, *supra.*

In the case at bar the instruments sued on are promissory notes. Of this there can be no question, as it seems to us. They read: "The Independent School District of Ackley, "Hardin county, Iowa, promises to pay to Foster Brothers "or order, at the Hardin County Bank, at Eldora, Iowa, on "the 1st day of May, 1872, five hundred dollars, for value "received, with interest at the rate of ten per cent. per an- "num, said interest payable semi-annually on the 1st day of "May and November in each year thereafter at the Hardin "County Bank, at Eldora, on the presentation and surrender "of the interest coupon hereto attached."

It is thus seen that they have the form, identical form, used for promissory notes. The additional statement that they are issued by authority of a particular law of the State of Iowa does not change their legal character.

An instrument is not the less a note because it contains a memorandum that the maker has deposited title deeds wit the payee as collateral security.

Wise *v.* Charlton, 4 Ad. and E., 786.
Faircourt *v.* Thorne, 16 L. J., Q. B., 344.

The obligations sued on are called bonds in the pleadings; but calling them bonds does not change their legal

effect. They are still promissory notes, payable to Foster Brothers or order, and when indorsed by Foster Brothers in blank are transferrable by delivery merely, and are negotiable by the law merchant.

The law merchant is nothing more than those customs of trade and commerce generally recognized by commercial men.

That a promissory note payable to order and indorsed in blank is negotiable by the law merchant is too plain for argument.

That being so, it is very clear that the circuit court had jurisdiction.

If it had, and this court so holds, that will end the case, for there is no other question that *can* arise on the record. Counsel for plaintiff in error concede this.

The record is very brief, and is now in print. The whole case is before the court, and we ask that our motion may be granted.

A. T. BRITTON,
W. H. SMITH,
Att'ys for Deft. in Error.